United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2239

To be argued by
ROBERT B. HEMLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2239

UNITED STATES OF AMERICA,

Appellee,

—v.—

MELVIN KEARNEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America,

ROBERT B. HEMLEY,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Melvin Kearney appeals from a judgment of conviction entered on September 16, 1974 in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 73 Cr. 1039, filed November 15, 1973, charged in Count One that Kearney conspired with Phyllis Pollard, Joe Lee Jones, Jr., Twymon Myers and Avon White to rob the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, and to use firearms in the course of the robbery. Title 18, United States Code, Section 371. Counts Two, Three and Four charged Kearney, Pollard and Jones with the robbery and theft of money from the bank and the use of firearms in the course of the robbery and theft,

in violation of Title 18, United States Code, Sections 2113(a), 2113(b), and 2113(d), respectively.*

Only Kearney proceeded to trial, which commenced on June 24, 1974. On June 26, 1974 the jury found Kearney guilty as charged in Count One, and not guilty as charged in Counts Two, Three and Four. On September 16, 1974, Kearney was sentenced to a term of imprisonment of five years. The sentence was made to run concurrently with a sentence of ten years imprisonment also imposed by the Court on September 16, 1974 on Kearney's conviction for robbing the Bankers Trust Company, 2104 Crotona Parkway, Bronx, New York, and using a firearm in the course of the robbery, as charged in indictment 74 Cr. 242.**

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* Twymon Myers and Avon White were named in Count One as co-conspirators but not as defendants, and in Counts Two, Three and Four as participants but not as defendants. Myers was deceased at the time of the filing of the indictment. White had reached an understanding with the Government whereby among other things he would not be prosecuted for his participation in the instant bank robbery in exchange for his testimony in this and related cases.

Prior to the trial, on May 15, 1974 Jones withdrew his plea of not guilty to Count Three of the indictment and entered a plea of guilty. On May 20, 1974 Pollard withdrew her plea of not guilty to Count Three of the indictment and entered a plea of guilty.

On July 2, 1974, Jones was sentenced as a Young Adult Offender to a term of five years probation, with the special condition that he enroll in a school or training course and report to the court in person every ninety days. Counts One, Two and Four were then dismissed as to Jones.

On September 12, 1974, Pollard was sentenced as a Young Adult Offender to a term of five years probation with the special condition that she make a good faith effort to obtain a high school equivalency diploma and participate in a psychological or psychiatric counseling program. Counts One, Two and Four were then dismissed as to Pollard.

** Indictment Cr. 242, filed on March 12, 1974 charged Kearney and Gwendolyn Marie Ferguson in two counts with robbing the

[Footnote continued on following page]

On September 26, 1974 Kearney filed a motion for a new trial on both indictments. Argument was heard before Judge Motley on October 25, 1974. By memorandum decision and order filed November 12, 1974, the motion was denied.*

Kearney is presently serving his sentence.

Statement of Facts

The Government's Case

During June, 1973, Melvin Kearney was residing at 271 West 118th Street, New York, New York with Avon White, Joe Lee Jones, Jr., Phyllis Pollard, Twymon Myers and Robert Hayes (Tr. 138-139, 255).** When the group's funds began to run out, they discussed the prospect of robbing a bank to replenish them (Tr. 140, 256-257). After the idea was hatched, the group held meetings approximately three times a week to choose a specific bank and refine the robbery plans (Tr. 141, 257). At first, two banks were chosen

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Bankers Trust Company, 2104 Crotona Parkway, Bronx, New York, of approximately $175,000, and with using firearms in the course of the robbery, in violation of Title 18, United States Code, Sections 2113(a) and 2113(d), respectively. Only Kearney went to trial, which commenced June 17, 1974, before the Honorable Constance Baker Motley and a jury. Ferguson was then, and remains now, a fugitive. A mistrial was declared on June 20, 1974 when the jury failed to reach a verdict. Thereafter, the instant indictment, 73 Cr. 1039, was tried before Judge Motley and a jury, commencing on June 24, 1974 and concluding on June 26, 1974. Indictment 74 Cr. 242 was retried before Judge Motley and a jury, commencing on September 9, 1974. The retrial concluded on September 11, 1974, the jury finding Kearney guilty as charged in both counts of the indictment. Kearney has appealed from his conviction on indictment 74 Cr. 242. That appeal, assigned Docket No. 74-2238, is scheduled to be heard by this Court during the week of March 3, 1975.

* The memorandum decision is item E at the end of Kearney's appendix.

** "Tr." refers to the trial transcript; "GX" refers to Government Exhibit.

as possible targets, but the group collectively decided to rob the First National City Bank on Bruckner Boulevard in the Bronx because it was located in a less congested area and afforded a better getaway route (Tr. 141-142, 258). As an initial step in the robbery plans Pollard went to the bank to do reconnaissance. She returned to the apartment where she prepared a layout describing the number and location of the desks, doors and bank guards (Tr. 141, 259).

After the First National City Bank was selected, specific robbery assignments were given to each of the group's members. It was decided that White and Pollard would vault over the tellers' counter and gather the money; Kearney would guard the back stairs; Jones would guard the front door; and Myers would drive the getaway car. Hayes was not to directly participate in the robbery. Kearney, White and Jones would carry nine millimeter automatic pistols; Pollard would carry a .357 caliber magnum revolver; Myers would have a .45 caliber revolver and a nine millimeter submachine gun in the getaway car; Kearney would carry a smoke grenade to use in the event of pursuit by police (Tr. 142-145; 259-261).

Once the general plan was made, Kearney, White, Jones, Pollard, Myers and Hayes still needed a getaway car. White and Myers suggested obtaining a car from Queens College (Tr. 147, 261). On different occasions Myers and Pollard, White and Jones, and Kearney and Jones went to Queens College but were unsuccessful in their attempts to get a car (Tr. 147, 261). Finally, on July 17, 1973, Myers and Pollard were successful. They went to Queens College and at knifepoint took a dark brown Chevelle stationwagon from Queens College professor William Kempey (Tr. 107-109; 148-149; 261-262). After stealing the car, Myers and Pollard parked it in northern Manhattan and returned to the apartment on 118th Street; the group agreed to rob the bank the next day. That evening Myers, Jones and Pollard

drove past the bank and planned the getaway route (Tr. 149; 262).

The following morning, July 18, 1973, after preparing the weapons and their disguises, Myers drove Kearney, White, Pollard, and Jones to the bank in the stolen car. At approximately 10:15 A.M., according to plan, White, Pollard, Kearney and Jones entered the bank. (Tr. 150, 263). They announced it was a robbery and ordered the bank employees and customers to lie face down on the floor (Tr. 75; 79-80; 95-96; 151; 263-264). During the next four to five minutes Kearney and Pollard each fired a shot from their firearms, Pollard and White placed approximately $5500 of the bank's money in a pillow case, and Kearney, White, Jones and Pollard fled the bank and got into the getaway car in which Myers was waiting (Tr. 76; 80-85; 96-103; 117-120; 151-153, 157-158; 263-267). Myers dropped off White, Pollard and Kearney near Jerome Avenue and 174th Street in the Bronx and then proceeded to another point in the Bronx where he and Jones abandoned the car. (Tr. 153, 267) Myers and Jones, who had the money, then went back to 118th Street, where they met with Kearney, White and Pollard, and with Hayes, who had not left the apartment (Tr. 153-154, 268) They counted the money, each took $200 for personal use, and they placed the remainder of the $5500 in a kitty for group use (Tr. 154; 268-269).

At the time of the robbery, July 18, 1973, the deposits of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, were insured by the Federal Deposit Insurance Corporation (Tr. 67-72, GX 1).

The Defense Case

Kearney presented four witnesses, three agents of the Federal Bureau of Investigation and Suzanne Jones, the wife of one of the Government's witnesses, Joe Lee Jones, Jr.

Agent Danny Coulson testified that during the course of an interview on September 26, 1973, Avon White had identified the participants in the bank robbery as himself, Joe Lee Jones, Jr., Twymon Myers and Phyllis Pollard. The defendant's name, Melvin Kearney, did not appear in the report of the interview, and Agent Coulson could not recall if White had mentioned his name (Tr. 376-377; GX 3513).

Agent Christopher Morrison testified that one of the bank tellers, Maria Rossi, had described the robbers who remained in front of the counter as being five feet eight inches to five feet nine inches tall (Tr. 397).

Agent Robert McCartin testified that Carlos Gonsalves, who had been a Government witness, described the men he saw fleeing from the bank as being five feet seven inches tall (Tr. 399).

Suzanne Jones rebutted Joe Lee Jones, Jr.'s statement that he had voluntarily surrendered to the authorities. She related that Jones had told her he had been arrested by some detectives (Tr. 401-402).

ARGUMENT

POINT I

The trial court properly excused venireman John Ramirez for cause.

Upon voir dire, venireman John Ramirez volunteered that he had been convicted in California in 1970 of possessing marijuana, which he said was a misdemeanor, and in 1960 of distributing heroin, which he said was a felony. He further stated that he spent sixteen months in prison

on the heroin charge as a youthful offender.* (Tr. 34-16-34-17; 34-20).** The Court then excused him (Tr. 34-24).

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* The Court's questions to Mr. Ramirez and his responses were:

Q. How many of you have ever been charged with a crime? Juror No. 5. A. (PJ 5) Yes.

Q. Juror No. 5. What crime were you charged with? A. Drugs.

Q. When was that? A. 1970.

Q. 1970? A. Yes.

Q. And did you go to trial in that case? A. No. I pleaded guilty.

Q. I see. What drug was involved? A. Possession of marijuana.

Q. Possession of marijuana. You say that was 1970? A. Yes.

Q. Was that a felony? A. Well, I do have another case in California, which is a felony. This was a misdemeanor.

Q. You have a felony conviction in California? A. Yes.

Q. I think you are disqualified by that reason.

* * * * *

Q. Juror No. 5. I believe you said you were convicted of a felony in California? A. Yes.

Q. What did that involve? A. Sales of drugs.

Q. What kind of drug was involved? A. Heroin.

MR. HEMLEY: What was the answer?

A. Heroin.

Q. Heroin. Have you been pardoned for that crime? A. No; I was sentenced.

Q. I see. A. To a YA, they call it up there, Youthful Offender. I was a minor.

Q. How old were you at the time? A. 18, going on 19.

Q. And your conviction was not wiped out as a Youthful Offender? A. Well, I never checked into it. It's been some like fifteen, fourteen years.

Q. How much time did you spend in prison? A. Sixteen months.

Q. Was that a state court in California? A. Yes.

** These citations, prefixed "34-", are to the transcript of the voir dire of the jury.

Kearney contends that the trial court committed reversible error in excusing Mr. Ramirez. He further contends that the provisions of the Jury Selection and Service Act of 1968 (Title 28, United States Code, Sections 1861 et. seq.) which disqualify from jury service persons convicted of a crime punishable by imprisonment for more than one year are unconstitutional.

It is clear that by virtue of his criminal record Mr. Ramirez was not qualified to sit as a juror. Title 28, United States Code, Section 1865(b)(5) provides in relevant part that a person is not qualified to serve on a petit jury in the district court if he:

> ". . . has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

Kearney's assertion that Youth Authority treatment in California is classified as a misdemeanor by California law is irrelevant. Mr. Ramirez was disqualified by virtue of the fact that the crime he committed was punishable by imprisonment for more than one year together with the fact that his civil rights had not been restored.

Kearney's attack on the constitutionality of Section 1865 as depriving him of due process of law similarly lacks merit. The use of valid selective criteria, such as conviction of crimes punishable by more than one year, as a basis for disqualifying prospective jurors has consistently been upheld in this Circuit and elsewhere. *United States* v. *Arnett,* 342 F. Supp. 1255, 1261 (D. Mass. 1970) (Wyzanski, *J.*); *see also United States* v. *Fernandez,* 480 F.2d 726, 733 (2d Cir. 1973); *United States* v. *Leonetti,* 291 F. Supp. 461 (S.D.N.Y. 1968).

Finally, even if the trial court had erred in dismissing Mr. Ramirez for cause, the error was harmless. It is axiomatic that the trial court is afforded broad discretion in the jury selection process, subject to reversal only in an instance of clear abuse not here present. *United States* v. *Grant*, 494 F.2d 120, 123 (2d Cir. 1974); *United States* v. *Ploof*, 464 F.2d 116, 118, 119 n.4 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972); *Stephan* v. *Marlin Firearms Company*, 353 F.2d 819, 822 (2d Cir. 1965), *cert. denied*, 384 U.S. 959 (1966). The fundamental concern is that the defendant be tried before an impartial jury, and the defendant is entitled to no more. As stated in *United States* v. *Puff*, 211 F.2d 171, 185 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954):

> "Having no legal right to a jury which includes those who because of scruple or bias he thinks might favor his cause, *he suffers no prejudice if jurors, even without sufficient cause, are excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does error occur.*" (emphasis added)

See also *Simpson* v. *United States*, 184 F.2d 817, 819 (8th Cir. 1911).

POINT II

The trial court did not improperly limit ... rney's cross-examination of White and Jones.

Kearney claims that his ability to impeach the Government's principal witnesses, Avon White and Joe Lee Jones, Jr. was curtailed by the Court's prevention of his use of a youthful offender conviction to impeach White and a misdemeanor conviction to impeach Jones.

Kearney's cross-examination of Avon White was devoted almost entirely to impeachment of White's credibility gen-

erally. Kearney established, *inter alia,* that White had participated in armed bank robberies in Oak Point, Bronx (Tr. 159, 220, 221, 225) and Cambria Heights, Queens (Tr. 161, 225); had brutalized a bank teller during the course of the Oak Point robbery (Tr. 206, 226); had attempted to murder two policemen (Tr. 164, 170); had engaged in a shootout with police at the time of his arrest (Tr. 217-218); had been a fugitive from justice (Tr. 212); had violated parole by possessing drugs (Tr. 204-205); had been convicted in North Carolina of possession of a gun (Tr. 183); had been committed to an institution for the criminally insane (Tr. 181, 197); had made a number of statements under oath inconsistent with his trial testimony (Tr. 189-191, 197, 214); had lied to prison psychiatrists at Comstock Prison in order to gain preferential treatment (Tr. 197-204, 237); had used aliases to mislead law enforcement officials and avoid incarceration (Tr. 211-212, 238-240); and had misled a defense attorney, Robert Bloom, who interviewed him in prison (Tr. 215-216). In addition, Kearney established that White had entered into an extensive arrangement with the Government under which, in exchange for his testimony, he would not be prosecuted for numerous offenses, would serve in a federal rather than a state prison, would have a statement made in his behalf by the prosecutors at the time of his sentence, and open counts pending against him at the time of his sentence would be dismissed (Tr. 159-176, 187-194, 205-206, 225, 238-239, 249-252). Still further, White testified that he had reviewed his testimony on a number of occasions with the United States Attorney (Tr. 237).

On two separate occasions the trial court commented that Kearney had more than sufficiently established White's motive to lie, and that the limit of permissible cross-examination had been reached (Tr. 223, 236).

Similar to his treatment of White, on cross-examination of Joe Lee Jones, Jr., Kearney almost entirely avoided any inquiry into the facts of the case. Instead, he concentrated virtually all his questions in an attack on Jones' credibility. Kearney established that Jones had been promised the open counts against him in Indictment 73 Cr. 1039 would be dismissed and that the prosecutor would make a statement in his behalf at the time of sentencing (Tr. 277, 341); that he was AWOL from the Marines, for which he faced possible life imprisonment (Tr. 272, 276, 280); that he had used aliases to avoid incarceration (Tr. 331, 336-330); and that he had reviewed his testimony with the United States Attorney (Tr. 326). Kearney's argument that he was not allowed to directly inquire into the area of Jones' prior arrest, which the Government represented resulted in a misdemeanor conviction (Tr. 282), conveniently omits that the court allowed him to inquire whether Jones had ever been convicted of any felonies in addition to bank larceny, and whether he had any charges pending against him (Tr. 284, 286).*

The argument that his cross-examination was improperly curtailed rests on Kearney's *ipse dixit* that "[t]here is no such legal concept as sufficiency of impeachment." (Brief at 38). The contrary is in fact the law. *United States* v. *Blackwood*, 456 F.2d 526, 530-531 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972). The testimony Kearney sought to elicit impeached the witnesses' credibility in an insubstantial way, *United States* v. *Puco*, 453 F.2d 539, 542-543 (2d Cir. 1971), particularly in the light of all of the other criminal activity brought out by Kearney. The Court afforded Kearney a wide latitude in these cross-examinations, and whatever minor limitations there were fell well

* Jones' response to these questions was that he had been arrested before but believed it was for a misdemeanor (Tr. 285), and that he did not have any charges pending against him (Tr. 286).

within the Court's discretion. *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). See also *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir. 1974); *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Mahler*, 363 F.2d 673, 676-678 (2d Cir. 1966).

Finally, the argument that the curtailment of his cross-examination was crucial because the jury rejected so much of the testimony of White and Jones by the acquittal on the substantive counts cannot withstand serious scrutiny. No conclusion about what testimony was accepted or rejected by the jury can be drawn from the verdict. At the very least, the jury's acquittal on the substantive counts was plainly inconsistent with the trial court's charge and with the facts they must have found to convict on Count One, for the finding that Kearney had conspired to rob the bank, which the jury made by its conviction on Count One, compelled, under the Court's *Pinkerton* instruction, conviction on the substantive counts as well. Kearney's argument here is nothing more than "speculation" and ". . . the strong policy against probing into [the jury's] logic or reasoning . . ." *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3239 (October 22, 1974).

POINT III

The trial court's charge was proper.

Kearney contends that the trial court erred in purportedly omitting a specific instruction to the jury as to the federal insurance element in the conspiracy count and in instructing the jury that the testimony of a witness may be discredited by a demonstration that he has been convicted of a felony without also adding that the crimes which

Government witnesses Avon White and Joe Lee Jones had admitted were felonies. These contentions are without merit.

Contrary to Kearney's assertions, the trial court did instruct the jury that in order to convict on Count One, the conspiracy count, they had to find among other things that the bank which the defendants conspired to rob was insured by the Federal Deposit Insurance Company during the existence of the conspiracy. The Court began its charge on Count One by reading that count of the indictment to the jury (Tr. 496-498). Paragraphs A, B and C of that count describe the objects of the alleged conspiracy as robbing and stealing money and employing the use of firearms in the course of robbing and stealing money, from banks "the deposits of which were then and at all times referred to in this indictment insured by the Federal Deposit Insurance Company". Thereafter the court referred back to the indictment, explaining to the jury that in order to convict they must find, among other things, "the existence of the conspiracy *as charged in the indictment*" (Tr. 499-500), and "that it was a purpose of the conspiracy *as alleged in the indictment* to violate Title 18, United States Code, Section 2113(a), (b) and (d) . . ." (Tr. 500). Later in the charge, the Court instructed the jury that one of the elements of charges laid under those sections was that the bank in question be insured by the Federal Deposit Insurance Corp. at the time of the offense charged (Tr. 508-510, 512-513, 514). These instructions was sufficient. *United States* v. *Koss*, Dkt. No. 74-1878 (2d Cir., November 15, 1974) slip op. at 431.

Even if the trial court's instructions had been inadequate on this point, no error would have been committed. The First National City Bank, the robbery of a branch of which was the aim of the conspiracy, is a national bank, by virtue of which federal jurisdiction was established. Title 18, United States Code, Section 2113(f). Accordingly,

no allegation, proof or instruction as to the existence of Federal Deposit Insurance was necessary. *United States* v. *Mauro,* 501 F.2d 45 (2d Cir. 1974).*

The court's charge regarding the impact of prior convictions on a witness' credibility closely adhered to the law in this Circuit.** *E.g., United States* v. *Owens* 263 F.2d 720 (2d Cir. 1959); *United States* v. *Provoo,* 215 F.2d 531 (2d Cir. 1954). The suggestion, in light of the testimony at trial, that Kearney was prejudiced because the court did not specifically instruct the jury that the crimes admitted to by White and Jones were felonies is absurd. Both White and Jones detailed their participation in and use of firearms during the armed bank robbery which formed the basis of the instant indictment. Additionally, White testified that he had been convicted of the attempted murder of a policeman (Tr. 135), the robbery of a second bank (Tr. 134), possession of a gun (Tr. 183), and possession of drugs (Tr. 204). The seriousness of these crimes could hardly have been lost on the jury.

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* Much of Kearney's complaint here seems to be based on his notion that the Government offered insufficient proof that the First National City Bank branch on Bruckner Boulevard was insured by the Federal Deposit Insurance Corp. However, the testimony of the Assistant Cashier of the First National City Bank (the entire bank and not merely the Bruckner Boulevard branch), who was custodian of the certificates of insurance for all domestic branches, that the branch was insured during the relevant period, coupled with introduction of the certificate of insurance valid for that branch from 1969, was sufficient to prove this element of the crime (Tr. 66-72; GX 1). *E.g., Hamilton* v. *United States,* 475 F.2d 512, 514 (6th Cir. 1973); *United States* v. *Riley,* 435 F.2d 725 (6th Cir. 1970); *United States* v. *Thompson,* 421 F.2d 373, 379 (5th Cir.), *vacated on other grounds,* 400 U.S. 17 (1970).

** The Court instructed the jury:

> "The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony. Prior conviction does not render a witness incompetent to testify but is a circumstance which you may consider in determining the credibility of such witnesses" (Tr. 491).

POINT IV

The sentencing procedure was proper.

Kearney argues that he must be resentenced because, in denying him Young Adult Offender treatment and sentencing him to five years in prison, the court relied on evidence supporting charges of which he had been acquitted. This argument is entirely without merit.

It was entirely proper for the trial court to rely on the evidence at trial, even though Kearney was acquitted of the substantive charges. *United States* v. *Atkins,* 480 F.2d 1223 (9th Cir. 1973); *United States* v. *Sweig,* 454 F.2d 181, 184 (2d Cir. 1972).* In addition, the Court made a specific finding that appellant would not benefit from treatment as a Young Adult Offender "because the Court's observation of Mr. Kearney is, that he has nothing but contempt for authority including the authority of this Court and that

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* At the time of the sentencing here, Kearney was also sentenced upon his conviction for armed robbery of the Bankers Trust Company, 2104 Crotona Parkway, Bronx, New York, as charged in Indictment 74 Cr. 242. In that case Kearney was sentenced to ten years in prison, to run concurrently with the five year sentence imposed here.

The Court announced, before imposing sentence simultaneously on both cases:

> "The Court has considered the pre-sentence report and of course this case was tried before the Court, both cases, so the Court is familiar with the evidence adduced at that trial and its on the basis of that evidence alone which the Court sentences the defendant at this time. That evidence disclosed that this defendant was involved in each case in a major bank robbery which involved not only the use of firearms, but the use of force. A bank manager, I guess it was, was actually struck over the head by one of Mr. Kearney's accomplice in Indictment 74 Cr. 242. In the first indictment the evidence disclosed that Mr. Kearney himself fired a firearm." (S. 351-352)

"S" refers to the minutes of the sentencing, which appear as a portion of the transcript of the trial of Indictment 74 Cr. 742.

such an attitude on his part is not conducive to rehabilitation." (S. 352)

Given the evidence available to the court upon which Kearney's sentence was based, the Court's statement of its reasons for the sentence imposed, and Kearney's opportunity to review the pre-sentence report and to comment on it, there is no basis for an attack on the propriety of the sentence. *United States* v. *Brown,* 479 F.2d 1170 (2d Cir. 1973); *United States* v. *Needles,* 472 F.2d 652 (2d Cir. 1973); *United States* v. *Sweig, supra.*

POINT V

Kearney's new trial motion was properly denied.

After the trial of this case, Kearney moved for a new trial on the grounds that the Government had improperly suppressed two items to which Kearney claimed he was entitled.

First, and primarily, Kearney complained that the Government had not complied with 18 U.S.C. § 3500 because he had not been furnished with an F.B.I. report of an interview with Avon White on September 17, 1973. This report, which catalogued White's admissions of his numerous antisocial activities on behalf of the Black Liberation Army, contained the following statement with regard to the July 18, 1973 robbery of the First National City Bank on Bruckner Boulevard:

> "On July 18, 1973, AVON WHITE, MELVIN KEARNEY, TWYMON MYERS, the girl named MARGARET, and a male by the name of JOE participated in the armed robbery of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York. WHITE advised that MYERS and the girl known as MARGARET stole the car used in this robbery from Queens College."

Kearney, who was first furnished this report by the Government at his second trial on Indictment 74 Cr. 242, claims that the misidentification of Phyllis Pollard as "Margaret" in the report would have been of substantial use to him in cross-examining White at his earlier trial in this case.

The second claim was that the Government failed to include—in a letter to defense counsel under date of March 28, 1974, regarding the benefits Avon White would receive for his testimony—that White would not be prosecuted for *four* bank robberies, rather than the three mentioned in the letter.

Judge Motley heard argument on the motion on October 25, 1974, and denied the motion by order with opinion filed November 12, 1974.* The Court found that the inadvertent non-disclosure of the F.B.I. report of White's September 17 interview did not warrant a new trial and that the Government's arrangement with White was fully brought out at trial. Judge Motley's denial of the motion was clearly correct.

A. The F.B.i. Report

Kearney's complaint with regard to the non-disclosure of the report of the interview of White on September 17, 1973, is premised on the notion that it was producible as a statement by White under 18 U.S.C. § 3500. Indeed, the report had been produced on that basis many months earlier when White testified at the trial of *United States* v. *Jo Anne Chesimard and Freddie Hilton*, 73 Cr. 572, before the Honorable Arnold Bauman, United States District Judge, and it was as 3500 material that Kearney was given it at his second trial on Indictment 74 Cr. 242 (H. 7-8).** On the motion below, the Assistant United States Attorney conceded that the F.B.I. report was 3500 material and explained

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* The opinion is Item E at the end of Kearney's Appendix.

** "H" refers to the transcript of the post-trial hearing on Kearney's motion for a new trial.

that his failure to produce this report occurred because it was not in the file of this prosecution and that he had not been aware of its existence, despite his inquiries about White's statements to the F.B.I. and to the Assistant United States Attorneys in charge of the *Chesimard* case and Kearney's prosecution on Indictment 74 Cr. 242 (H. 8-9; 22; 29-32). In her opinion below, Judge Motley also appears to have assumed that the report was 3500 material, and the opinion below rests on the determination that its non-disclosure does not warrant a new trial.

While Judge Motley's opinion is fully supported on the ground upon which it rests, we respectfully submit that, as a preliminary matter, the summary of the interview of White on September 17, 1973 was not producible because it was not a "statement" as defined in 18 U.S.C. § 3500(e). *Palermo* v. *United States*, 360 U.S. 343 (1959); *United States* v. *Polizzi*, 500 F.2d 856, 892-893 (9th Cir. 1974); *United States* v. *Pacheco*, 489 F.2d 554, 566 (5th Cir. 1974); *United States* v. *Goodman*, 470 F.2d 893, 898 (5th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973); *United States* v. *Goldstein*, 456 F.2d 1006, 1012 (8th Cir. 1972); *United States* v. *Roberts*, 455 F.2d 930 (5th Cir. 1971).* Of course, that the report was not producible under Section 3500 does not foreclose an obligation to disclose it under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, see *United States* v. *Yagid*, Dkt. No. 74-1517 (2d Cir.,

* The Government's concession below that the report of the interview with White on September 17, 1973, was producible under Section 3500 was based on an overly generous construction of the scope of the Jencks Act born of the practice of the United States Attorney's Office for the Southern District of New York to turn over such F.B.I. reports whether they are technically 3500 material or not. While this practice is, we believe, a sound one, the fact that it was inadvertently not followed here cannot bootstrap the non-production of the statement into a Jencks Act violation.

November 21, 1974), slip op. at 5908-5909, if it was "material" to the guilt or punishment of the accused. Here, for reasons substantially overlapping those underlying Judge Motley's disposition of this motion, we submit that the report was not *Brady* material. As noted, White's credibility was subjected to a withering assault on the basis of his own criminal activities, his favorable arrangements with the prosecution in return for his testimony, his prior hospitalization for being mentally deranged, and his perjured testimony in prior proceedings. (See page 10, *supra*). Moreover, as Judge Motley noted, though the claimed utility of the report of the September 17, 1973, interview arose from its ascription to one "Margaret" of the role in the bank robbery actually played by Phyllis Pollard,* the important point is that in that interview White did identify *Kearney* as one of the bank robbers. And while no doubt White could have been impeached with the prior identification of Pollard as "Margaret", the misidentification of Pollard as "Margaret" did not undercut the testimony of White and Jones concerning Kearney's involvement in the bank robbery or White's statement at the September 17 interview—his first upon apprehension—that Kearney had been one of the bank robbers. For these reasons the statement was not material under *Brady* v. *Maryland, supra. Moore* v. *Illinois,* 408 U.S. 786, 794-796 (1972).

The Court need not, of course, consider any of this since it is clear, as Judge Motley found, that the non-disclosure of the report was inadvertent and its availability to and use by Kearney's counsel could not have resulted in a different outcome at the trial. *United States* v. *Sperling,* Dkt. No. 73-2363 (2d Cir., October 10, 1974) slip op. at 5649; *United States* v. *Mayersohn,* 452 F.2d 521, 526 (2d Cir. 1971). On the former question, it is uncontroverted that the Assistant United States Attorney did not know of the

* There is no question that it was Pollard who did what White attributed to "Margaret" in that interview. White properly identified Pollard in later interviews and in his trial testimony, and Pollard pleaded guilty to the offense.

existence of this F.B.I. report, which was not in the case file he believed to be complete. The latter issue, we submit, was properly resolved against Kearney, not only because of the wealth of other material used to impeach White's testimony generally, *United States* v. *Pfingst,* 490 F.2d 262, 277-278 (2d Cir. 1973), *cert. denied,* — U.S. —, 94 S. Ct. 2625 (1974), and the corroboration of White's testimony by Jones, *United States* v. *Sperling, supra,* slip op. at 5660-5661, but primarily because of the Government's disclosure and Kearney's substantial use at trial (Tr. 376-377, 437-438) of an F.B.I. report (GX 3513) of a subsequent interview of White in which, while listing Pollard (and not "Margaret") as a participant in the July 18 robbery, he made no mention of Kearney. Cf. *Rosenberg* v. *United States,* 360 U.S. 367, 370-371 (1959).

E. The Deal With Avon White

Kearney further contended that he was entitled to a new trial because the Government, in expressing its understanding with Avon White, failed to disclose that White had been involved in a total of four bank robberies rather than three, and that a recommendation would be made to the Bronx County Supreme Court Judge before whom he had pleaded guilty to attempted murder that his state sentence should run concurrently with his federal sentence. The concurrent sentence promise was brought to the jury's attention during the cross-examination of Mr. White (Tr. 176-177, 206) and discussed *in camera* with counsel before the completion of cross-examination (Tr. 178-181). As to the number of bank robberies, the Government accurately stated its understanding * that White had been involved in three bank

* The Government's understanding with White was expressed in a letter addressed to Kearney's attorney dated March 28, 1974. Kearney was advised that in exchange for White's cooperation, it was agreed that:

> "(1) he might plead guilty to the bank robbery count (20 year maximum penalty) of the three counts in which he had been named in Indictment 73 Cr. 572;

[Footnote continued on following page]

robberies, not four, since the three disclosed were the only three of which the Government was aware at the time of White's testimony in this case. (H. 27).* In any event, the cross-examination of White on the question of his arrangements with the Government more than established that he was receiving substantial consideration for his testimony (Tr. 159-176, 187-194, 205-206, 225, 238-239, 249-252).

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(2) at the time of his sentence on Indictment 73 Cr. 752 the Government would consent to the dismissal of the two counts which remain open against him, and call his cooperation to the attention of the sentencing judge;

(3) the Government would decline to prosecute him for his participation in the April 10, 1973 robbery of the Jackson Heights Savings and Loan Association, Northern Boulevard, Queens, New York, and the July 18, 1973 robbery of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

(4) at the time of his sentence for attempted murder in the New York State Court, the Government will call to the state court's attention his cooperation in the federal court."

* Kearney relies on a letter dated July 12, 1974, addressed to White by Assistant United States Attorney Robert Clarey of the Eastern District of New York, regarding White's testimony at the trial in July, 1974 of *United States* v. *Freddie Hilton*, 74 Cr. 54 (E.D.N.Y.). Mr. Clarey makes reference to two bank robberies in the Eastern District in his July 12 letter, while the Government's letter of March 28, several months earlier, in this case mentions only one robbery in the Eastern District. But the fact that the Assistant United States Attorney in the Eastern District wrote White, nearly a month after the trial in this case, about the second Eastern District bank robbery is no proof that anyone—even Mr. Clarey—knew of the second Eastern District bank robbery when this case was tried, and as noted, the record establishes the contrary.

POINT VI

The Government was not estopped from prosecuting Kearney on both Indictment 73 Cr. 1039 (The First National City Bank robbery) and Indictment 74 Cr. 742 (The Bankers Trust Company robbery).

Kearney claims his conviction on this indictment barred his subsequent retrial on Indictment 74 Cr. 242. Even if this claim had merit, it is made in the wrong appeal.

Originally, Indictment 73 Cr. 1039, the First National City bank robbery, was assigned to Judge Motley and indictment 74 Cr. 242, the Bankers Trust robbery, was assigned to Judge Bauman.

On May 17, 1974, at a pre-trial conference Judge Bauman announced that indictment 74 Cr. 242 would be tried on June 17, 1974. (B. 39).*

On June 5, 1974, at a pre-trial conference Judge Motley, unaware of the trial date which Judge Bauman had set, announced that indictment 73 Cr. 1039 would be tried on June 17, 1974 (M. 2). To resolve the conflict, Judge Motley arranged to have both cases assigned to her (M. 5). A conference was then held on June 6, 1974 to determine which of the two cases should be tried first. The Government argued that what it regarded to be its stronger case, 74 Cr. 242 (The Bankers Trust Company robbery) should proceed as scheduled on June 17 (M. 3). Appellant disagreed. The Government then represented that if Kearney were convicted on Indictment 74 Cr. 242, the other indict-

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* "B" refers to the separately paginated minutes of the May 17, 1974 pre-trial conference before Judge Bauman. "M" refers to the separately paginated minutes of the June 6, 1974 pre-trial conference before Judge Motley.

ment would not be pursued (M. 3, 9-10). Judge Motley agreed to try Indictment 74 Cr. 242 first (M. 25-26).

The trial of Indictment 74 Cr. 242 commenced on June 17, 1974 and ended on June 20, 1974 in a mistrial. Judge Motley then scheduled this case, Indictment 73 Cr. 1039, for trial on June 24, 1974. When the trial of this case resulted in a conviction for conspiracy only, Kearney argued that the Government was foreclosed from retrying the Bankers Trust Company robbery. Judge Motley ruled to the contrary: "What they [the Government] obviously had in mind, Mr. Berman, is that if he were convicted in this case on the indictment, not on one count, or if he had been convicted in that other case, on the indictment, they would have dropped this. That was obviously what they meant." (Tr. 546-547).

Kearney himself seems to agree that nothing in the Government's pretrial statements, even construed as he would have them, foreclosed the trial and conviction of Kearney on this indictment. The Government's statements, however broad and "estopping" Kearney would make them, were clearly contingent on a conviction at the first trial of Indictment 74 Cr. 242, and there was no conviction on any count at that trial.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. HEMLEY,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert B. Hemley being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of February, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert B. Hemley

Robert B. Hemley

Sworn to before me this

5th day of February 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975